In the Supreme Court of the Hawaiian Islands.

JUNE TERM, 1894.

IN EQUITY.

SAMUEL NORRIS vs. EMILIE DE HERBLAY.

BEFORE JUDD, C. J., BICKERTON AND WM. FOSTER ESQ. WHO SAT IN PLACE OF FREAR, J. DISQUALIFIED.

(1) A Court of Equity may only interfere with a judgment at law where the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.

(2) In the former case the statute of limitations was pleaded to the action which was debt on a foreign judgment of a Court of Record. The decision of the Law Court was that the allegations of the complaint were satisfactorily proved and the plaintiff entitled to judgment. No express finding on the statute of limitations was asked for or made, and no exception was taken thereto. No motion in arrest of judgment was made before judgment was entered: Held, the motion in arrest could not have prevailed if seasonably made, for the record disclosed no error.

(3) It does not appear from the record whether the statute of limitations of six years was pleaded or whether the cause was taken out of the statute by some legal cause of exception.

OPINION OF THE COURT BY JUDD C.J. (FOSTER DISSENTING)

This case came on for hearing, on appeal, at the March Term 1894 of this Court. A re-argument on one point was ordered and had at the June Term. Having duly considered the case and the decision appealed from, rendered by Circuit Judge Whiting on the 7th March 1894, we hereby adopt the said decision as our own, and affirm the order made therein sustaining the demurrer and dissolving the injunction.

Following is the decision hereby adopted:

"The defendant demurs to plaintiff's bill of complaint and for cause says that the Bill does not state such a case as would entitle the complainant to any relief in a Court of Equity.

The plaintiff seeks to restrain the further enforcement of a judgment recovered by the defendant herein against the plaintiff herein in the Supreme Court of the Hawaiian Islands on August 25, 1891, on the ground that such judgment was entered by mistake of fact.

Many cases have been cited to show the authority of a Court in Equity to interfere with a judgment at law, and our Supreme Court has repeatedly stated the grounds for relief.

A Court of Equity may only interfere with a judgment at law where 'the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.'

See Hop v. Parke, 6 Haw. 688.

H. Hackfeld v. Bal, 6 Haw. 364.

2 Story Eq. Jur. 887; 894.

The sole grounds for relief in equity against a judgment of a Court of law are for accident, fraud, mistake or surprise, where on account of one or more of these causes it would be against conscience to execute the judgment.

Mills v. Briggs, 4 Haw. 506.

The grounds set forth in the Bill of Complaint, which are alleged to show that the judgment in question was entered by mistake, are substantially those contained in and fully covered by the decision of the Supreme Court in the case of

E. de Herblay v. S. Norris, Supreme Court, H. I. Special Term, July 24, 1893.

The elements and points raised therein on comparison are identical with the allegations contained in this Bill of Complaint and the decision covers most of the points in this present case in Equity; and the Supreme Court had before it the point now raised in this Bill as to the pending of exceptions, and in its decision after citing the points raised and considered it says:

'The defendant took no steps to prevent the entry of judgment or to bring the case within the rule which provided for the allowance of a bill of exceptions which would prevent the entry of judgment. The bill of exceptions was not filed or allowed until August 29, 1891, four days after the entry of judgment and so far as the record shows that no notice by defendant of any intention to prevent entry of judgment was in any way given; no motion for a new trial nor in arrest of judgment nor the filing of a Bill of Exceptions was made before the entry of judgment and the presumption is that defendant relied upon his bill of exceptions as a stay of execution merely, the effect of sustaining his exceptions being merely the vacating of the judgment.'

Under that decision the judgment now sought to be vacated or restrained was held to be legally entered and valid.

The question of the statute of limitations was in issue in the original case of De Herblay v. Norris, the plaintiff therein specifically alleging that the New York judgment upon which the action was brought was rendered by the Court of the City and County of New York and that that Court was a Court of Record, and the defendant pleaded the statute of limitations. Mr. Justice Dole 'decided that the allegations of the (Plaintiff's) complaint are satisfactorily proved and the plaintiff is entitled to judgment.'

Thus the statute of limitations was then in issue and decided against the defendant Norris, and no exception was taken by the defendant to this although other exceptions were taken and put into a Bill of Exceptions and taken to the Supreme Court.

I cannot regard this omission to further contest the question of the action being barred by the statute of limitations as a mistake for which Equity will grant relief. Such a defense is a personal and special one and was raised in that action, and when decided against defendant it neither was appealed from nor exceptions taken to a higher Court and its further consideration by a higher Court not being urged was rather a matter of abandonment than mistake. The present plaintiff could have availed himself of the effect of the statute of limitations in the case at law and it does not appear in the Bill that he was prevented by mistake or any other of the grounds upon which Equity will relieve.

I am of the opinion that the Bill does not set forth sufficient grounds in Equity to entitle the plaintiff to maintain his cause and I sustain the demurrer.

Decree accordingly."

In addition, we observe that it does not appear to us that, if the present plaintiff had been reinstated to the position he was in on the 22nd August, 1891, when the decision of Mr. Justice Dole in the law case was filed and before judgment was entered therein, a motion in arrest of judgment would have prevailed. The declaration was in debt on a judgment of a Court of record of a foreign country, and the date of the judgment was given, a date nearly twenty years before the action was begun, and the statute of limitations was pleaded. Remembering that judgment can be arrested for no other than substantial faults or defects apparent on the record either in the pleadings or the verdict of the jury, and (by parity of reasoning) in the finding of the Court jury waived, how does it appear that the record discloses error?

The plea did not indicate whether the statute of limitations of six years or that of twenty years was intended to be pleaded. But we take it that the plaintiff intended to plead the statute where the period of limitation is six years. But there might exist exceptions which would take the cause out of the operation of the statute. These need not be pleaded in the declaration nor set up by plea to the statute. They could be made to appear by evidence. There was, therefore, no error *apparent* on the face of the record. The decision of the Court upon the facts and the law, whether it found that foreign judgments of Courts of record were not barred by the six years limitation, or whether it found on the evidence that the cause was taken out of the operation by some exception to the running, of the statute, might be considered by the then defendant to be erroneous and the subject of exception. No exception was taken on this point. No distinct ruling was asked for so that exception could be taken. The pleadings do not disclose any defect and we therefore hold that a motion in arrest, if made seasonably, would not have availed the plaintiff.

The proper method of raising the question as to whether the judgment was barred was by exception. Not taking this course, defendants' opportunity to test this question was lost, and to allow him the opportunity now would not be in accord with the rules of Equity when invoked to interfere with a judgment at law.

Authorities to sustain the view that the error complained of must be apparent on the record and not saved by any statutory exceptions or a motion in arrest will not lie, are:

Sawyer v. Borton, 144 Mass. 470.

3 Blackstone Com. 393.

Board v. Adams, 76 Ind. 504.

We affirm the decree sustaining the demurrer and the order dissolving the injunction.

A. S. Hartwell and F. M. Hatch for plaintiff; P. Neumann and Carter & Carter for defendant.

Honolulu, July 13, 1894.

DISSENTING OPINION OF WILLIAM FOSTER ESQ.

I respectfully dissent from the Majority of the Court, for the following reasons:

First.—The Decision of Mr. Justice Dole, filed August 22, 1891, made no reference to the plea of the Statute of Limitations, nor any finding upon that point: the question was, therefore, in my judgment, not then passed upon, nor has it since been adjudicated.

Second.—The entry of judgment on August 25, 1891, was improper, because exceptions were pending, and because the judgment was entered in vacation in a jury waived case. Such entry was contrary to Statutes and Rules of Court, and was not authorized by stipulation of parties.

Third.—Upon the motion in arrest of judgment, the question of the bar of the Statute of Limitations was properly before the Court, to the same extent as upon a Writ of Error: in either case, the failure to allege exceptions at an earlier stage ought not to be held to waive or exclude the further remedy.

I am, therefore, of the opinion that the decision of the Circuit Judge, sustaining the demurrer, should be set aside, and the case sent back to him for hearing solely upon the question whether, at the time the original suit at law was brought in this country, it was barred by our Statute of Limitations: if it was so barred, then the judgment in that case should be set aside: if it was not barred, the judgment must stand.

It is a matter of regret that final settlement of this case has been so long delayed, and it may well suggest some reforms in our procedure: but it seems to me more inequitable that this Court should now refuse to allow the question of the Statute of Limitations to be adjudicated, than it would be to further delay an already protracted litigation, in order that a Court of Equity may know whether a judgment at law ought to be enforced.

Honolulu, July 13, 1894.

In the Supreme Court of the Hawaiian Islands.

JUNE TERM, 1894.

IN THE MATTER OF THE ESTATE OF C. MANAOLE, DECEASED.

BEFORE JUDD, C. J., BICKERTON AND FREAR, JJ.

The contestant upon appeal from a decision of the Probate Court admitting the will to probate did not show *prima facie* that she would inherit property from the decedent if the will should be refused probate. Held, that she was not entitled to a trial by jury.

OPINION OF THE COURT BY FREAR, J.

This matter was heard in Chambers by a Circuit Judge who admitted the will to probate. On appeal to the Circuit Court by the contestant, Elizabeth Harvey, and motion there for trial by jury, such trial was had resulting in a verdict for the contestant. The case now comes here on several exceptions, the only one of which necessary to be considered is that to the overruling of proponent's motion to dismiss the appeal on the ground that the contestant had not shown herself to be an heir of the decedent. The proponent is Malsea Kealia Manaole, widow of the decedent.

It is unquestioned law that "the person desiring to appeal against the decision of the Probate Court, admitting the will to probate, must claim and prove *prima facie* at least, that he is an heir-at-law of the decedent, and would inherit the property involved, or some interest in it, if the will should finally be refused probate." Estate of Bernice P. Bishop, 5 Haw. 288; Estate of C. Brenig, 7 Haw. 640. This is a condition prerequisite to the trial by jury. The only question here is, whether *prima facie* proof of heirship was in fact made.

Neither the motion for trial by jury nor the affidavit accompanying it refers to the matter of heirship. The motion, however, was based on the "records and files herein" as well as upon the affidavit. The only papers among the files which relate to the question of heirship are: (1) the sworn petition of the proponent containing an allegation that the contestant is a neice of the decedent and that one Kale Elia Willie Manaole is his adopted son; (2) certain articles of adoption duly legalized by a justice of the Supreme Court, bearing the seal of said Court and duly recorded in the Registry of Conveyances, whereby the decedent adopted one Keolanui (the same person as Kale Elia above mentioned) as his son and heir; and (3), an unsworn protest against the probate of the will wherein the contestant states in general terms that she is "an heir at law and next of kin" to the decedent. Admitting for the purposes of this case that the person desiring to appeal need not show her heirship herself as by affidavit, but that she may rely upon the records and files in the case, it cannot be seriously contended that her heirship in this case is thus shown even *prima facie*. That there is a son who would inherit to her exclusion is shown by the undisputed articles of adoption and by the petition for the probate of the will. Against these there is only an unsworn protest referring to heirship in general terms without stating what the relationship is. There was no denial of the allegation in the petition, or question raised as to the validity or effect of the articles of adoption.

It may be added that the undisputed evidence adduced at the trial showed that Keolanui was a son and heir of the decedent by adoption and that the contestant was a daughter of decedent's cousin. The Court therefore erred in refusing to give the seventh instruction requested by the proponent as follows: "You must find for the proponent of the will, as the contestant has no right to contest the probate of the will, it having been shown to you that Keolanui is by adoption the legal heir of C. Manaole in case the will was not sustained."

The exception to the overruling of the motion to dismiss the appeal is sustained, the verdict set aside, and case remanded to the Circuit Court for dismissal of the appeal.

J. A. Magoon for proponent; C. W. Ashford for contestant.

Honolulu, July 17, 1894.

Daily Advertiser, 75c. per month

DOG EAT DOG.

A Sample of the Love Royalists Have For Each Other.

The following editorial appeared in the Holomua last evening. It is a striking example of how the royalists talk about one another:

"HIS LAST STRAW.

"Mr. John E. Bush who is seeing his brief power over the Hawaiians slipping from his grasp, is now in a paroxysm of rage and irresponsible anger only equalled at the time when he painted Samoa red. He has not outlined any policy, as we invited him to do. He has not brought any argument worthy of notice to bear against our avowed principle that the Hawaiians must either fight or vote. He simply sits in his corner, advises the people to pray and wait and fills his sheet with the vilest attacks against all and everybody who advocate or adhere to the policy of the Holomua. Too cowardly to fight, too egotistical to vote, he tries to ruin the political chances of the Hawaiians for the purpose of posing as a prophet and a martyr. His latest refuge is to discredit the editor of this paper by saying that bribery runs high in our office, and that we are revelling in missionary money. The Christian (?) gentleman who presides in Printers' Lane judges the editor of this paper by his own inclinations and records. We regret to call the attention of Mr. John E. Bush, the ex-Minister of Interior, the ex-Ambassador to Samoa, and the ex-politician, to his own political career and his own knowledge of briberies. We care not to go back to the dark ages under Kalakaua and show what he then was. We have no space or time to write up his very interesting history in Samoa. We simply desire to remind him of his career in the last Legislature where he one day was found as the bitter opponent of the Reform Party, the next day as the virtuous defender of the Reform Party and the crusher of the National Reform Party, and the third day against the Queen, the Government, the Reform Party—and only for Bush. Does he remember how his little church was built and who put up the money for it? Has he forgotten the "small" compensations which occasionally were handed to him for an accommodating vote? *We* remember them—even to the number of the checks."